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In the Supreme Court of the United States

October Term 1965

No. 651

MONTANA EASTERN PIPE LINE CO.,
a corporation,

Petitioners,

vs.

SHELL OIL COMPANY, FIDELITY GAS COMPANY and MONTANA-DAKOTA UTILITIES COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No.....

MONTANA EASTERN PIPE LINE CO.,
a corporation,

Petitioners,

vs.

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---

PETITION FOR CERTIORARI

Montana Eastern Pipeline Co., petitioner, prays that a Writ of Certiorari issue to review the judgment and order of the Ninth Circuit Court dated March 15, 1965, affirming the judgment of the United States District Court for the District of Montana.

OPINION BELOW

The order affirming the judgment of the District Court is reported in *216 F. Supp. 214.*

JURISDICTION

The judgment of the Court of Appeals was entered on the 15th day of March, 1965, and a Petition for Re-Hearing was denied on May 10, 1965. The jurisdiction of this Court is invoked under *28 U.S.C.A., Section 1254 (1).*

On August 7, 1965, there was filed a petition for extension of time within which to petition for Writ of Certiorari, and on August 12, 1965, this Court under Order signed by Mr. Justice Douglas extended the time within which to file for Writ of Certiorari until October 7, 1965.

QUESTIONS PRESENTED

(1) Whether or not any notice of default specifying the nonperformance under the operating agreements was required to be given by petitioner to respondents, or their predecessors, to cancel and terminate the five operating agreements and reinvest petitioner with the proprietary and reversionary interests he has in the lands and mineral rights under Montana law as it was interpreted in 1928 when the operating agreements were entered into?

This principal question raises the following questions:

(a) Are the laws of Montana, as interpreted at the time a contract is made, incorporated into the contract?

(b) Does a prolonged period of non-performance of the Operating Agreements give rise to a presumption of abandonment?

(c) Does lack of due diligence, as expressed in the Operating Agreements, for drilling and developing oil and gas lands constitute abandonment?

(d) Whether the burden of proving due diligence in complying with the terms of the operating agreements is upon the one who is to perform accordingly?

(e) Whether the doctrine of res adjudicata was properly applied in the original judgment?

STATUTES INVOLVED

Section 73-114, Revised Codes of Montana, 1947.

"OIL, GAS AND MINERAL LEASES, RELEASE OF RECORD OF."

When any oil, gas, or other mineral lease heretofore or hereafter executed shall become forfeited, it shall be the duty of the lessee, his successor or assigns, within sixty days from the date this act shall take effect, if the forfeiture occurred prior thereto, and within sixty days from the date of the forfeiture of any and all leases and have such lease released from record in the county where the leased land is situated without cost to the owner thereof."

History: En. Sec. 1, Ch. 22, L. 1917.

STATEMENT

The District Court had jurisdiction because there is diversity of citizenship and the amount in litigation exceeds $10.000.00. *28U.S.C.A. 1332.*

The action was commenced in the United States District Court of the District of Montana, Billings Division on March 19, 1959. An Amended Complaint was filed in that Court on November 9, 1961.

The action is one in the nature of a quiet title proceeding to cancel operating agreements and determine rights under

various operating agreements for the drilling and development of oil and gas production on certain government leases in Fallon County, Montana. The petitioner is the assignee of the original mineral permit holders.

By their Answer respondents claim that the Operating Agreements have never been abandoned or terminated, and also that a previous action *(Atlantic Pacific Oil Co. of Montana vs. Gas Development Co., et al (1937) 105 Mont. 1, 69 Pac. (2nd) 750)* was res adjudicata as to this petitioner.

Petitioner's reply to respondents Answer alleges that the Operating Agreements should be declared cancelled for failure to develop the lands and for failure to fully perform the obligations under the Operating Agreements since 1937.

The question on the merits is whether respondents abandoned their rights under the Operating Agreements, or whether any notice was required, or whether there was sufficient notice of cancellation of those rights given by petitioner to respondents. Petitioner contends that under existing Montana law no notice was required to be given for cancellation where there was a prolonged failure to perform the conditions of the Operating Agreements, or in the alternative, that if some notice was required, that notice was fully expressed in letters written by petitioner to respondent, Shell Oil Co. (Appendix pp. 22, 23)

Trial in the District Court of the District of Montana resulted in summary judgment for respondents (Appendix p. 14). The District Court based its judgment on a finding that there was not sufficient notice of cancellation given respondents, and that the judgment in *Atlantic Pacific Oil*

Co. of Montana vs. Gas Development Co., et al., 105 Mont. 1, 69 Pac. (2nd) 750 was res adjudicata to this petitioner. (Appendix p. 24)

Upon appeal, the Court of Appeals of the Ninth Circuit affirmed the judgment and denied a petition for re-hearing.

In the early 1920's the government issued oil and gas permits embracing government lands to individuals who would try to develop them. A lease could be obtained when a producing well was drilled thereon. Between 1925 and 1930 Rocky Mountain Pacific Oil Company and the Montana Eastern Pipe Line Company were incorporated in Montana. Herbert Stokes was president of Rocky Mountain Pacific Oil Company and all of the so-called Stokes Operating Agreements stemmed from that time. Certain permit holders executed Operating Agreements with Stokes who then assigned them to Rocky Mountain Pacific Oil Co.

The permit holders served cancellation notices on Stokes and Rocky Mountain Pacific because neither Stokes or Rocky Mountain Pacific performed any drilling operations or paid any consideration to the permit holders under a drilling contract. The default correction period had expired and Stokes and Rocky Mountain Pacific had taken no action to cure their default by commencement of drilling. The permit holders assigned their leases to Montana Eastern Pipe Line Company and at that time, John Wight, an officer of the company, put up the money to drill a producing gas well on each of five leases, namely, Dailey, Scott, Talmadge, Teeters and Wood leases.

Capital Gas Company was to drill the wells on the permits assigned to Montana Eastern Pipe Line Co. into the Judith River sands to a depth of about 800 to 1100 feet. A previous agreement to develop the lands between Rocky Mountain Pacific Co. and Capital Gas Co. was disapproved by the Secretary of the Interior by reason of excess acreage. A short time later, the government approved assignment of the permits to Montana Eastern Pipe Line Co. on request of the permit holders and the leases were validated by the drilling of a producing gas well on each lease by Montana Eastern Pipe Line Co.

Later, Rocky Mountain Pacific Oil Company commenced an action against Capital Gas Co. to cancel the contract which had been disapproved by the Department of the Interior, and abandoned. Montana Eastern Pipe Line Company and the permit holders were not made parties to the action, nor served with process of any nature, but the subsequent decree stated in effect that Rocky Mountain Pacific Oil Co. was the owner of all the properties listed in the contract between it and Capital Gas Co., which included the Dailey, Scott, Talmadge, Teeters and Wood leases, which are involved in the Stokes Operating Agreements and which had been assigned to Montana Eastern Pipe Line Company and approved by the Department of the Interior.

Subsequently, Rocky Mountain Pacific Oil Co. changed its name to Atlantic-Pacific Oil Co. and commenced a quiet title action by virtue of the above mentioned decree, and obtained another decree which in effect placed the operating rights in the name of Atlantic-Pacific Oil Co., in spite of the fact that neither Stokes, Rocky Mountain Pacifi Oil

Co., nor Atlantic-Pacific Oil Co. had invested any money in drilling, paying lease rentals, or consideration to the permit holders, or paid for the gas wells drilled.

Later, Atlantic-Pacific Oil Co. was bought by Montana-Dakota Utilities Co. and the former corporation was dissolved.

About 1935 Montana-Dakota Utilities Co. and its wholly-owned subsidiary, Fidelity Gas Co., drilled a deep test well to about 6400 feet and when oil was not encountered the well was plugged and abandoned. Neither company did anything further to drill upon or develop this land.

Since 1937 no development or drilling was undertaken by Montana-Dakota Utilities Co., or Fidelity Gas Co., its wholly-owned subsidiary. In 1951, Shell Oil Co. and Montana-Dakota Utilities Co. entered into a drilling agreement for oil exploration under the original Stokes Operating Agreements, dating back to 1928. (Oil had been discovered about 1948 in the Cedar Creek Anticline not far from the leases and permits covered in the old Stokes Operating Agreements.)

This action was commenced on March 19, 1959 after no prospecting, drilling or development was conducted by Montana-Dakota Utilities Co. or Fidelity Gas Co. since 1937, or by Shell Oil Co. since 1951 for oil or gas below the 2000 foot level, although oil had been found nearby in 1948 and that the lands were most probably productive.

Your petitioner contends that it is the owner of the rights of the original permitees, including the reversionary interests of the Stokes Operating Agreements under which all of the respondents claim their present rights.

The Cedar Creek Anticline is a geological structure in the shape of a long, narrow oval in eastern Montana, the length being about 65 miles. There are varying structures containing natural gas above 2000 feet and oil below 2000 feet. Montana-Dakota and Shell control 75,000 to 80,000 acres, 2,000 of which are in question here. Though spacing limits would permit one well for every 160 acres, only four producing wells have been drilled since 1937, and these since December, 1956.

REASONS FOR GRANTING THE WRIT

(1) The Writ should be granted because the U.S. District Court's refusal to follow Montana law on the subject marks an important departure from the accepted rules on the interpretation and construction of oil and gas leases and contracts in the cases cited in (2) below, and is contrary to *28 U.S.C.A. 1652.*

(2) The decision is in conflict with the decisions of the Supreme Court of Montana:

1926 McDaniel vs. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582.

1927 Solberg vs. Sunburst Oil Co., 76 Mont. 254, 246 Pac. 168.

1927 McNamer Realty Co. vs. Sunburst Oil Co., 76 Mont. 332, 247 Pac. 116.

1928 Bowes vs. Republic Oil Co., 78 Mont. 134, 252 Pac. 800.

1929 Stevens vs. Potlatch, 80 Mont. 239, 260 Pac. 119.

1930 Abell vs. Bishop, 86 Mont. 478, 284 Pac. 525.

1932 Willard vs. Campbell, 91 Mont. 493, 11 Pac.(2d) 782.

1933 *Berthelote vs. Loy Oil Co., 95 Mont. 434, 28 Pac.(2d) 187.*

1936 *Severson vs. Barstow, 105 Mont. 526, 63 Pac. (2d) 1022.*

1941 *Cedar Creek Oil & Gas Co. vs. Archer, 112 Mont. 477, 117 Pac. (2d) 265.*

1957 *Schumacher vs. Cole, 131 Mont. 166, 309 Pac.(2d) 311.*

(3 The decision conflicts with the applicable decisions of the Supreme Court of the United States, particularly the decision in *Sauder vs. Mid-Continent Oil Co. 292 U.S. 272.*

(4) The decision is in conflict with another decision of the Ninth Circuit, *Stanolind Oil & Gas Co. vs. Guertzgen, 100 F2d 299.*

(5) The decision is in conflict with the decisions of other Circuits, *Sinclair Oil & Gas Co. vs. Masterson (Fifth Circuit) 271 F2d 310, Gloyd vs. Midwest Refining Co. (Tenth Circuit) 62 F2d 483, Brewster vs. Lanyan, (Eighth Circuit) 140 F 801.*

(6) That an important question of public policy is involved, i.e., whether an individual, or corporation, can withhold large segments of public land from the development intended by the government, indefinitely, by inaction under development contracts, and at the same time drain the natural resources from beneath those lands by maintaining producing wells around the perimeter, or at strategic points.

(7) The decision denies to petitioner the right to a decision on the merits by the application of the doctrine of res adjudicata where no impelling reasons support its application.

(8) That the respondents and their predecessors will have held petitioner's rights and interests for 28 years without payment for the same, without developing the same, and contrary to the purpose of public land development, and contrary to good practice in the industry, all a result condemned by this Court in *Sauder vs. Mid-Continent Oil Co. 292 U.S. 272.*

ARGUMENT

One of the petitioner's main contentions is that the old 1928 Stokes Operating Agreements had expired by its own terms. Failure on the part of Stokes, and his assignees, to develop and drill these lands with due diligence should constitute abandonment. The Montana Statute cited *Sections 73-114, Revised Codes of Montana of 1947* was enacted in 1917, and has remained unchanged since. It imposes a duty upon a lessee, his successor and assigns to release of record such leases which had become forfeited. Subsequent following statutes gave the lessor a cause of action for damages for failure or refusal to do so.

This statute is not directly involved here, but is cited to show that the law in Montana favored the lessor. All of the Montana decisions cited involved the abandonment, forfeiture, termination or cancellation of mineral leases or drilling contracts arising in various ways from various types of instruments and agreements. It has been uniformly held in this State that in oil and gas cases the forfeiture clause was to favor the lessor, and should be strictly enforced against the lessee.

The *Solberg vs. Sunburst Oil Co., 76 Mont. 254, 246 Pac. 168,* in 1927 laid down the general principles of con-

struction and interpretation of instruments involving mineral rights. Ever since, the Montana Supreme Court has insisted upon strict compliance with the terms of the instrument and has favored forfeitures for non-compliance. In 1957 *Schumacher vs. Cole 131 Mont. 166, 309 Pac. (2nd) 311* reiterated the principles laid down in the *Solberg case, supra,* and reaffirmed the Montana rule that non-compliance constitutes forfeiture.

Petitioner urges that the law of Montana, as it existed at the time the Operating Agreements were made was incorporated into the Operating Agreements and that no notice of noncompliance was necessary, and that even if some notice was required, that notice which was given was more than sufficient. (Appendix p. 22)

The District Court held that the ruling in *Atlantic Pacific Oil Co. vs. Montana Eastern Pipe Line Co., 05 Mont. 35, 71 Pac. (2nd) 763* was res adjudicata against petitioner. This decision is an isolated one, ignored in at least eight prior cases and has never been cited or followed in an oil and gas case since. The District Court's opinion (Appendix P. 25, Ft. Note 10) is based on the reasoning that there is a trend toward relaxing the rule which favors forfeitures. This may be so in other jurisdictions, but not in Montana. The Court gave no impelling reason why an isolated case should constitute res adjudicata to petitioners.

It is too well established that the Federal Courts of the respective states must follow local law to require further discussion. *28 U.S.C.A. 1652.*

The decision conflicts with *Sauder vs. Mid Continent Oil Co., 292 U.S. 272, supra.* Neither Stokes, nor his

assignees, did any drilling or development from 1937 until December 1956, although the lands covered by the Operating Agreements were situated over a well-known natural gas reservoir controlled by respondents Montana-Dakota Utilities Company, and its subsidiary, Fidelity Gas Company. The deep test well in 1937 for oil was the only drilling undertaken between 1928 and 1956. This, we do not feel, constitutes due diligence in drilling or developing the lands described in the agreements in a known field and the old Stokes Operating Agreement were either abandoned or forfeited, and should have been cancelled by the Court below. The burden of proof to establish due diligence in performance of an oil and gas lease is on the lessee. *(Severson vs. Barstow, 105 Mont. 526, 63 Pac. (2d) 1022.*

This Court in the *Sauder* case used the following language in cancelling leases:

> "The production of oil on a small portion of the leased tract cannot justify holding the balance indefinitely and depriving the lessor, not only of the expected royalty from the production pursuant to the lease, but of the privilege of making some other arrangement for availing himself of the mineral content of the land."

The petitioner feels that the Court below should have ordered full, or partial, cancellation of the Operating Agreements.

The U. S. District Court of Montana should be bound by the decisions of the Circuit Court of Appeals, Ninth Circuit, but the District Court decision sought to be reviewed by petitioner is in conflict with the prior Ninth Circuit decision of *Stanolind Oil & Gas Co. vs. Guertzgen, 100 F2d 299,* which decision arose in the Montana district

and cited with approval the Montana rule announced *Solberg vs. Sunburst Oil Co., supra.*

The decision conflicts with other Circuits. *Sinclair Oil & Gas Co. vs. Masterson (Fifth) 271 F2d 310, Gloyd vs. Midwest Refining Co. (Tenth) 62 F2d 483,* and *Brewster vs. Lanyan (Eighth) 140 F.801,* all impose strict compliance upon lessees and favor forfeiture for failure to fulfill contractual committments.

One of the original purposes of the law in issuing the mineral permits and leases on public lands was to encourage private development on a competitive basis and to discourage monopolistic control of the public domain. Public policy is still concerned with the problem of whether any individual, or entity, can withhold large segments of public land, indefinitely, from the development intended by the government, and at the same time drain the natural resources from beneath those lands by drilling producing wells only around the perimeter or at strategic points.

CONCLUSION

It is respectfully submitted that this Petition for Certiorari should be granted.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

MONTANA EASTERN PIPE LINE COMPANY, a corporation, *Plaintiff,* vs. SHELL OIL COMPANY, a corporation; FIDELITY GAS COMPANY, a corporation; MONTANA-DAKOTA UTILITIES COMPANY, a corporation; etc. *Defendants.*	Civil No. 206 OPINION

Defendants have moved for summary judgment pursuant to Rule 56(b), F.R.C.P. The relevant facts have been stipulated, and the parties in their respective briefs are in essential agreement in their statements of fact. The issues arise in the conclusions to be drawn from these facts and supporting documents.

Plaintiff brought this action to quiet title to two United States Government oil and gas leases covering lands in Fallon County, Montana.[1] These leases are a consolidation of four oil and gas prospecting permits issued be-

[1] Pertinent allegations of the amended complaint include:
"VIII. That by virtue of its ownership of the aforementioned oil and gas leases the plaintiff has the exclusive right to drill for, extract, produce and dispose of all of the oil and gas in and under the lands included in said oil and gas leases, as hereinabove described.

tween December, 1926, and February, 1928, to permittees Wood, Dailey, Scott and Teeters. On February 14 and 20, 1931, the permittees executed written assignments to plaintiff. Upon filing of the assignments the Commissioner of the General Land Office on November 11, 1931, approved the assignments and issued a consolidated prospecting permit to plaintiff. The two oil and gas leases were issued to plaintiff on April 20, 1933, and December 1, 1938, respectively, subject to any rights which Atlantic-Pacific Oil Company might be able to establish.

Between March 1, 1928, and October 24, 1928 (and prior to the execution of the assignments to plaintiff) each of the permittees entered into an operating agreement with Herbert Stokes whereby Stokes was granted the sole and exclusive right to explore for and produce oil and gas from the lands covered by the permits.[3] Atlantic-Pacific Oil Company succeeded to the rights of Stokes in these operating agreements. Atlantic-Pacific subsequently instituted an action in the District Court of the Sixteenth Judicial

---

"IX. That the defendants, named and unknown, as aforesaid, claim and assert, or may claim and assert an estate, right or interest in or to the lands and premises above described, or in or to the oil and gas therein or thereunder, or in, to or under the oil and gas leases above described, or some part thereof, or a lien or encumbrance upon said premises, adverse to the ownership and rights of the plaintiff herein.

"X. That any such claim or possible claims of the defendants and each of them is without any right whatsoever, and that said defendants, named and unknown, have no estate, right or interest whatever in or to or under said oil and gas leases, or in or to said described lands and premises or the oil and gas therein or thereunder."

[3] The pertinent provisions of the Stokes operating agreement are sumarized in plaintiff's brief as follows:

"(1) *Right conferred upon Operator*—

(a) The right to enter upon the land and prospect and drill the same for oil and gas;

District of the State of Montana, in and for the County of Fallon, against Montana Eastern Pipe Line Company, et al. on October 5, 1935, the District Court entered a judgment in favor of Atlantic-Pacific. This judgment was affirmed by the Montana Supreme Court on February 2, 1937. 105 Mont. 35, 69 P.2d 763.

On January 6, 1936, Atlantic-Pacific entered into two operating agreements with Fidelity Gas Company, a defendant herein, for the development of lands lying below a depth of 2,000 feet. On January 6 and 16, respectively, plaintiff entered into unit agreements No. 4 and No. 5 with Montana-Dakota Utilities Company, another defendant, for the development of lands lying above the depth of 2,000 feet.

On April 10, 1951, the defendants Fidelity Gas Company, Montana-Dakota Utilities Company, and Shell Oil Company entered into an operating agreement, whereby Shell was granted sole and exclusive right to explore for and produce oil or gas in lands lying below a depth of 2,000 feet. Pursuant to this agreement, Shell Oil Company, between March 1, 1957, and March 4, 1959, drilled to completion four producing wells and one dry hole. The accumulated production from the four wells to October 31, 1962, was 491,988 barrels.

On October 30, 1940, in consideration of the payment of $1,500, plaintiff, together with Capital Gas Company and John Wight, executed a release in favor of Atlantic-

---

(b) The right to purchase all oil or gas saved and produced from the premises;

(2) *Obligations assumed by Operator*—

(a) To pay the permitees certain percentages of royalty;

Pacific Oil Company and Montana-Dakota Utilities Company, a copy of which is attached to defendants' answer as Exhibit 2.

Plaintiff's action to quiet title is based primarily upon its claim that the defendants and their predecessor in interest, Atlantic-Pacific Oil Company, have failed and neglected to develop the lands covered by the leases in accordance with the covenants contained in the Stokes operating agreements.

In support of their motion for summary judgment defendants contend:

1. Defendants have not been served with notice of default under the Stokes agreements.

2. Until such notice has been served, the final judgment and decree in the case of Atlantic-Pacific Oil Company v. Montana Eastern Pipe Line Company, et al, is res adjudicata between the parties and constitutes a bar to maintenance of this action.

3. Until such notice has been served, the final judgment and decree is res adjudicata and estops plaintiff from relitigating the ownership of operating rights under the federal leases involved in this action.

4. The release given by plaintiff and others on October 30, 1940, constitutes a bar to maintenance of this action.

Plaintiff contends:

(b) That if oil or gas in commercial quantities was found on the premises, the operator would proceed with due diligence to develop the premises to the maximum production commensurate with market conditions.

(3) *Rights conferred upon Permitees*—

(a) The right to certain royalty payments;

(b) The right at option of permitee to cancel the agreement should the operator fail to keep or perform the conditions of the agreement."

1. Notwithstanding performance, if any, of the obligations owed by defendants Fidelity Gas Company and Montana-Dakota Utilities Company under the Fidelity operating agreements and unit agreements No. 4 and No. 5, the defendants have failed and neglected to develop the lands in accordance with the covenants contained in the Stokes operating agreements.

2. Neither the Atlantic-Pacific judgment nor the release bars the plaintiff from asserting a breach of the Stokes agreements; the plaintiff is the owner of a continuing contingent reversionary interest under the Stokes agreements; the obligation to develop in accordance with the terms of the Stokes agreements is a continuing obligation; and should the contingency occur at any time during the life of the Stokes agreements, the reversionary interest will ripen, and plaintiff will be entitled to the possession of the lands or such portion thereof as may have succumbed to the contingency.

3. No notice was necessary, and if given, it would have been an idle act.

It is necessary first to ascertain just what was involved and determined in Atlantic-Pacific Oil Company v. Montana Eastern Pipe Line Co., 1937, 105 Mont. 35, 71 P.2d 763, and a companion case, Atlantic-Pacific Oil Company v. Gas Development Co., 105 Mont. 1, 69 P.2d 750. It appears from the opinion of the Montana Supreme Court in the latter case that Atlantic-Pacific brought these actions "in the nature of a suit to quiet title, seeking to have certain contracts relating to the production and recovery of oil and gas adjudged to be valid". The Stokes operating

agreements referred to above were "the subject matter of the controversy" there in issue. (105 Mont. 1)

The conclusions of law of the trial court read in pertinent part:

> "1. That the plaintiff's operating agreements are in all respects valid, effective, legal and outstanding, and binding upon the defendants, or any of them, as the claimants or owners and holders of oil and gas lease upon the real estate and premises covered by said operating agreements, or otherwise.
>
> "2. That the defendant, Montana Eastern Pipe Line Company, took the assignments of permits subject to the said outstanding operating agreements and subject to the rights of the plaintiff thereunder.
>
> "3. That the authorization by the Secretary of the Interior of oil and gas lease upon said premises does not affect the rights of the plaintiff under said operating agreements, and the said defendant, Montana Eastern Pipe Line Company, holds or will hold the said lease and the rights thereunder in and to said real estate and premises, subject to the said operating agreements in favor of the plaintiff, and said operating agreements are now effective against the said lease or any lease issued by the said Secretary of the Interior upon said real estate and premises.
>
> "5. Subject to the terms and conditions of said operating agreements, the plaintiff has the exclusive right to operate the said lands and premises under the said oil and gas lease, for the production of oil and gas, without restriction from the defendants or any of them.
>
> "6. Subject to the terms and conditions of said operating agreements, the plaintiff shall be and become the owner of all oil and gas produced from said lands and premises, with unrestricted power of disposition thereof as against the defendants or any of them.

"7. The plaintiff is entitled to have its said rights and title quieted as against the claims and pretensions of the defendants."

The court entered judgment in conformity with its findings of fact and conclusions of law, quieted title in Atlantic-Pacific under the operating agreements, and forever enjoined the defendants from interfering with or violating the rights of Atlantic-Pacific under the operating agreements. The Supreme Court affirmed.

As set forth supra, subsequent to the entry of judgment by the district court, Atlantic-Pacific entered into operating agreements with the defendants Fidelity Gas Company and Montana-Dakota Utilities Company; and these defendants in turn entered into an operating agreement with the defendant Shell Oil Company. The rights of all defendants accordingly are predicated upon those of its predecessor in interest, Atlantic-Pacific Oil Company. Likewise, any rights of the plaintiff are subject to the rights of Atlantic-Pacific and its successors, the defendants herein.

Plaintiff argues that it is the owner of a continuing contingent reversionary interest in the Stokes agreements. Defendants do not contend that this interest was terminated by the Atlantic-Pacific judgment, but rather that plaintiff cannot litigate the issue of defendants' performance under the Stokes agreements in the absence of a notice of default, and until such notice is served, the issue and parties before this court are identical to the issue and parties before the Montana courts in the Atlantic-Pacific case.

Plaintiff contends further that the Montana court's statement that Montana Eastern Pipe Line Company had not there given sufficient notice of default was dictum,

and as applied to that case, erroneous dictum. With respect to the failure to give notice, the Montana court said in pertinent part:

> "We deem it advisable to mention other phases of the controversy which tend to support our conclusion. "Paragraph 10[3] of the operating agreements provides for cancellation on failure of plaintiff to keep and perform the terms of the agreements, the right to take advantage of such failure being at the option of the first party, Wight, as the authorized attorney of the permittees. Wight, in conjunction with the permittees, gave notices of cancellation, and, in giving the notices, assigned no reason for the act, nor specified the particular way or manner in which plaintiff had failed to comply with any provisions of the agreements. Before any right to cancel could arise or be exercised, we think it was necessary that Wight, and possibly the permittees, give timely notice and call attention or show wherein Stokes or his assignees had failed to comply with such agreements."[4] (105 Mont. at 25, 26.)

It is apparent that the court passed squarely upon the sufficiency of the notice in "support" of its conclusion. I cannot agree that this statement was dictum.[5]

---

[3] Paragraph 10 of each operating agreement provided: "Failure on the part of the party of the second part (Stokes) to keep and perform the terms and conditions of this agreement shall render it subject to cancellation at option of party of the first part. (Permittee)"

[4] The court continued: "In the case of *Papoose Oil Co.* v. *Rainey*, 89 Okl. 110, 213 Pac. 882, the court went so far as to hold that before equity will grant a forfeiture for breach of implied covenants in a lease, the lessor must notify the lessee of the breach and demand compliance with the covenants. Every party is entitled to his day in court before he may be legally deprived of any property right. In the attempted cancellation of the operating agreements, Stokes was given no hearing; no attempt was made to have the respective rights of the parties legally determined, but Wight and the permittees arbitrarily assumed to reinvest themselves with full power over and control of the permits by cancellation of the operating agreements, and in doing so clearly violated paragraph 10 of such agreements."

[5] If dictum, in my opinion it was not "erroneous dictum". On the contrary, the language of the court is persuasive and in line with the general rule requiring notice of default discussed infra.

It is stipulated that the only notices of default claimed by the plaintiff to have been served upon any of the *defendants* are two letters—the first dated June 8, 1955, addressed to Shell Oil Company signed by E. A. Wight on behalf of John Wight;[6] the second dated February 26, 1957, also addressed to Shell Oil Company, signed by John Wight.[7]

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[6] This letter reads:

"June 8, 1955

Shell Oil Company,
Hart-Albin Building,
Billings, Montana

Re: Cedar Creek Anticline Oil & Gas Leases,

Attention Legal Department

Gentlemen:

On behalf of John Wight, who is at present in the east, and at his request, I am writing you this letter to put you on notice that he and the companies with which he is connected or associated, assert a claim to rights in various leases along the Cedar Creek Anticline, mainly those identified as leases of Montana Eastern Pipe Line Company, Capital Gas Corporation, designated further as the Teeters, Wood, Scott, Talmadge, Norskog, Anderson, et al leases, and that preparations are being made to commence quiet title action to determine and establish these rights, and that no title asserted by M.D.U., or Fidelity Gas Co., should be considered as valid until this action has been determined.

Very truly yours,
E. A. Wight

cc. Land Department"

[7] This letter, written on Midwest Holding Company stationery, reads:

"February 26, 1957

The Shell Oil Company
Hart-Albin Building
Billings, Montana

REGISTERED MAIL

RE: John Wight's claim to the oil rights covering lands in the Cedar Creek Field, Fallon County, Montana, as per plat attached.

Gentlemen:

Under date of September 10, 1949, again on May 20, 1951, and several times since, I addressed a letter to your company and all other oil companies operating in eastern Montana. I enclosed a plat describing the lands in which I claim to own or control the deep rights or hold a substantial interest in the oil rights. In those letters I warned your company and other oil companies that, if they acquired any leases on the oil rights, on the lands I described, they were doing so at their own risk and that a serious doubt existed that they would be obtaining any valid title to the lower zones until my rights have been determined.

I noticed that apparently the Shell Oil Company is disregarding my previous letters and warnings and are proceeding to acquire leases on some of those lands are (sic) are developing same without any regard to what my rights may be.

The first letter simply gives notice that Wight and companies with which he is associated claim rights in various leases, including the leases here involved, and that they intend to commence a quiet title action to determine and establish those rights. In the second letter Wight claims to "own or control the deep rights or hold a substantial interest in the oil rights" of the lands and again indicates that he intends to commence a quiet title action. Neither letter states any reason why defendants' rights are not valid or should be cancelled or terminated; and neither letter specifies any way or manner in which any of the defendants has failed to comply with any provision of the Stokes agreements. Obviously these letters are insufficient if notice was required.

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[7] (Cont.) I have a legal action now pending in the State of Delaware, which action will determine my rights to the deep sands covering some of these lands and, as soon as I can obtain some additional photostatic copies from the Land Office of the pertinent documents then, if it appears that I still have any deep sand rights to other lands, as listed, I will institute a quiet title action embracing said lands.

I am attaching hereto a list of those lands in which I claim an interest, designating the original serial number, name of original lease holders, and description of the lands. This is a duplicate of what I mailed you in 1949, 1951, and subsequently.

I trust you will be guided by this notice and warning.

Yours very truly,
John Wight

JW/gr
Encl. 1.

CC: Shell Oil Company, Denver, Colorado
Montana-Dakota Utilities Co., Minneapolis, Minn.
Stanolind Oil & Gas Company, Billings, Montana
Carter Oil Company, Billings, Montana
Mr. Armin Johnson, Attorney at Law, Minneapolis"

It is stipulated that there is no record that Fidelity Gas Company, Montana-Dakota Utilities Company or Armin Johnson received a copy of this letter.

Clearly the validity of the operating agreements was fully determined in the Atlantic-Pacific case, as were the rights of both plaintiff and defendants' predecessor in interest under those agreements.[8] The predecessor of defendants was held to be entitled to possession of all of the lands covered by the leases. As long as defendants perform their obligations under these agreements, they are entitled to remain in possession. Any issues with respect to the validity of the operating agreements or defendants' rights thereunder are res adjudicata.[9]

Obviously the rights of defendants are subject to the terms and conditions of the operating agreements. In support of its conclusion in the Atlantic-Pacific case, the Montana court held that before any right to cancel could arise or be exercised, it was necessary to "give timely notice and call attention or show wherein Stokes or his assignees had failed to comply with such agreements". This was not done in the Atlantic-Pacific case; nor has it been done here.

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[8] Note the similarity between the rights claimed by the plaintiff in those portions of the complaint set forth in note 1, supra, and those declared and granted to the defendants' predecessor in interest, Atlantic-Pacific Oil Company, in the trial court's conclusions of law set forth on page 5, supra.

[9] The rule here applicable was well stated by the Montana Supreme Court in In Re Smith's Estate, 1921, 60 Mont. 276, 301, 199 P.2d 696, 704: "The general principal announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. *(Southern Pac. R. Co. v. United States,* 168 U.S. 1, 42 L.Ed. 355, 18 Sup.Ct.Rep. 18.)"

The only reference to any notice of default in plaintiff's pleadings appears in paragraph VII of the amended complaint, wherein it is alleged that the "plaintiff herein * * * duly served written notice on *Atlantic-Pacific Oil Company* that the four so-called Stokes operating agreements * * * were cancelled and terminated by reason of the failure of Atlantic-Pacific Oil Company to comply with its obligations thereunder". As noted supra, the Montana court, in *Atlantic-Pacific,* considered this notice and expressly held that it was insufficient. In other words, the sufficiency of that notice was in issue and determined by the Montana Supreme Court and accordingly is res adjudicata.

In at least two cases subsequent to *Atlantic-Pacific* the Montana court has held that a "lessor who intends to claim forfeiture, where development is an element has the duty to demand that development proceed or commence". See Fey v. A. A. Oil Corp., 1955, 129 Mont. 300, 285 P2d 578; and Braun v. Mon-O-Co Oil Corp., 1958, 133 Mont. 101, 320 P.2d 366. In the latter case the court pointed out that there was "no written notice of any kind of lack of development until the lessor amended his complaint at the day of the trial".

Even though plaintiff has brought an ordinary quiet title action, in effect it seeks forfeiture of the leases for failure to comply with the terms of the operating agreements. The rule set forth in *Atlantic-Pacific* and the other Montana cases cited above is in accord with the general rule that notice or demand is a prerequisite to cancellation or forfeiture for breach of covenants of the lease, whether express

or implied.[10] Moreover, the "notice should express clearly the dereliction of which complaint is made". Merrill, Covenants Implied in Oil and Gas Leases, 2d ed. 427, § 196.[11]

This is not a case where a lease has automatically terminated, as in Schumacher v. Cole, 1957, 131 Mont. 166, 309 P.2d 311,[12] or has been abandoned or terminated by unreasonable delay with complete failure to perform,[13] or where a lessee in response to an oral demand or otherwise has manifested his intention under no circumstances to comply with the obligations resting upon him.[14] Under

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[10] The rule is expressed in Merrill, Covenants Implied in Oil and Gas Leases 420, § 192, as follows:

> "In various portions of this survey, we have had occasion to note rules relating to the necessity of notice, or demand, that the implied covenants should be complied with, as a prerequisite to cancellation or forfeiture of the lease for their breach. While such notice is not required universally, the tendency is to insist upon it, and there are to be found general statements of its indispensability as a prerequisite to forfeiture. It seems fair to say that the general trend is in that direction."

See also 3 Summers Oil and Gas 366, § 469; 58 C.J.S., Mines and Minerals § 205; and Sullivan, Handbook of Oil and Gas Law, § 108, p. 199.

[11] Other cases holding that notice is required include Papoose Oil Co. v. Rainey, Okla. 1923, 213 P. 882, cited by the Montana court in the Atlantic-Pacific case, supra; Hudspeth v. Schmelzer, Okla. 1938, 77 P.2d 1123; Kunc v. Harper-Turner Oil Company, Okla. 1956, 297 P.2d 371, 377; Pohlemann v. Stephens Petroleum Co., W.D. Okla. 1951, 99 F.Supp. 875, aff'd 197 F.2d 134; Davis v. Mann, 10 Cir. 1956, 234 F.2d 553, 560.

[12] See also Kugel v. Young, Colo. 1955, 291 P.2d 695.

[13] See, for example, Hitt v. Henderson, Okla. 1925, 240 P. 745; Benedum-Trees Oil Co. v. Davis, 6 Cir. 1939, 107 F.2d 981; Alphin v. Gulf Refining Co., W.D. Ark. 1941, 39 F.Supp. 570.

[14] See, for example, Indian Territory I. Oil Co. v. Haynes Drilling Co., Okla. 1937, 69 P.2d 624, where the court, in recognizing that proper notice is ordinarily required, held that where "positive demand" had been made for compliance and the lessee had manifested a "definite and positive intention not to comply with such demand", notice was not required. See also 3 Summers Oil and Gas, § 469 at p. 372.

these circumstances it has been held in many cases, although not uniformly, that notice would be a useless act and is unnecessary.[15]

In support of its contention that notice was unnecessary and would be a useless act, plaintiff relies primarily upon Calhoma Oil Corporation v. Conniff, Cal. 929, 279 P. 771. This case is factually distinguishable. A lessee instituted an action to enjoin the lessors from interfering with drilling operations. The lessors, by way of affirmative defense, alleged that the lessee had violated a provision of the lease requiring continuous drilling, which violation caused the lessor to serve written notice of cancellation. Lessee contended that the initial notice of forfeiture and cancellation was insufficient and defective and that a final notice given one day before lessors' filing suit to quiet title did not comply with the statutory requirement of three days' notice in an unlawful detainer action. The court held that this statute was not applicable and continued:

> "The fact that the lessors instituted a quiet title action within one day after service of the notice canceling and forfeiting the lease cannot avail the appellant (lessee), for the judgment of forfeiture now complained of was entered in this action—a separate and distinct proceeding—commenced by the lessee itself several weeks subsequent to the service of the notice of forfeiture. Assuming, only, that the owners of the land should have given some other or further notice, the lessee has all along contested, and now contests, the right of the lessors to claim possession. Therefore any defect in or failure of demand or notice may be regarded as having been waived by the appellant. (279 P. at 772.)

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[15] See 58 C.J.S. Mines and Minerals, § 205 at p. 514.

I question whether the rule in Calhoma v. Coniff would, in any event, be extended to the factual situation here presented. If so, I could not follow it in view of the decisions of the Montana court set forth supra, and particularly the holding in the Atlantic-Pacific case.

It is clear that the defendants have not been served with a notice of default. Until such notice has been served, the final judgment and decree in the case of Atlantic-Pacific Oil Company v. Montana Eastern Pipe Line Company, et al, is res adjudicata and constitutes a bar to this action. Having reached this conclusion, it is unnecessary to consider the effect of the release given by plaintiff on October 30, 1940.

Pursuant to Rule 11(b) of the local rules of court, defendants will prepare, serve and lodge form of judgment.

Done and dated this 29th day of March, 1963.

W. J. JAMESON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

MONTANA EASTERN PIPE LINE COMPANY, a corporation, *Plaintiff,* vs. SHELL OIL COMPANY, a corporation; FIDELITY GAS COMPANY, a corporation; MONTANA-DAKOTA UTILITIES COMPANY, a corporation; etc., *Defendants.*	Civil No. 206 SUMMARY JUDGMENT

The motion of the defendants for summary judgment pursuant to Rule 56(b) of the Rules of Civil Procedure having been presented, and the Court being fully advised, finds that defendants are entitled to summary judgment as a matter of law; all as appears from the written opinion rendered and filed herein on March 29, 1963.

It is therefore ORDERED, ADJUDGED and DECREED that the defendants' motion for summary judgment be, and the same hereby is granted; that the plaintiff have and recover nothing by its suit; that defendants Shell Oil Company, Fidelity Gas Co., and Montana-Dakota Utilities Co., go hence without day, and that defendants recover their costs and disbursements in this behalf expended and have execution therefor.

ENTER:

Dated this 25th day of April, 1963.

W. J. JAMESON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA EASTERN PIPE LINE COMPANY,
Appellant,

vs.

SHELL OIL COMPANY, FIDELITY GAS COMPANY and MONTANA-DAKOTA UTILITIES COMPANY
Appellees.

No. 19,327

[March 15, 1965]

Appeal from the United States District Court
for the District of Montana,
Billings Division

Before: ORR, HAMLEY and BROWNING, Circuit Judges.

PER CURIAM:

The judgment of the District Court is affirmed for the reasons stated in its opinion, *Montana Eastern Pipe Line Company v. Shell Oil Company, et al.,* 216 F.Supp. 214 (D. Mont. 1963).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from the Proceedings of Monday, May 10, 1965

Before: ORR, HAMLEY and BROWNING, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court IT IS ORDERED that the petition of the appellant, filed May 3, 1965, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied.

SUPREME COURT OF THE UNITED STATES

No....., October Term, 1965

MONTANA EASTERN PIPELINE CORPORATION,
Petitioner,

vs.

SHELL OIL COMPANY, ET AL

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 7, 1965.

/s/ W. O. DOUGLAS
Associate Justice of the Supreme Court of the United States

Dated this 12th day of August, 1965

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for Writ of Certiorari upon all other parties, to-wit:

ARMIN M. JOHNSON, Esq.
MESSRS. FAEGRE & BENSON
1260 Northwestern Bank Building
Minneapolis, Minnesota 55402
Counsel for Montana-Dakota Utilities Company and Fidelity Gas Company

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RAYMOND HILDEBRAND, Esq.
P. O. Box 811
Glendive, Montana
Counsel for Montana-Dakota Utilities Company and Fidelity Gas Company

at the addresses shown above by mailing a true and correct copy thereof to each, postage prepaid, and air mail to Armin M. Johnson and John D. Lawyer, this 5th day of October, 1965, pursuant to Rule 33 (3)(b) of the Rules of the Supreme Court of the United States.

Daryl E. Engebregson

Daryl E. Engebregson
25 First Avenue, Laurel, Montana
Attorney for Petitioner